No. 91-2045

In the Supreme Court of the United States

OCTOBER TERM, 1992

R. GORDON DARBY, ET AL., PETITIONERS

v.

JACK KEMP, SECRETARY OF HOUSING AND URBAN DEVELOPMENT, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF FOR THE RESPONDENTS IN OPPOSITION

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QUESTION PRESENTED

Whether petitioners were required to exhaust their administrative remedies before seeking judicial review of sanctions recommended by a hearing officer of the Department of Housing and Urban Development.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-7a) is reported at 957 F.2d 145. The orders of the district court (Pet. App. 8a-32a) are unreported.

JURISDICTION

The judgment of the court of appeals was entered on February 26, 1992. A petition for rehearing was denied on March 20, 1992. Pet. App. 93a. The petition for a writ of certiorari was filed on June 18, 1992. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. Petitioners, R. Gordon Darby and several real estate development companies that he owned or controlled, made use of a single-family mortgage insurance program offered by the United States Department of Housing and Urban Development (HUD) to finance multi-family housing projects in South Carolina. Among other things, petitioners' financing methods evaded HUD's minimum investment requirements as well as a limitation on the number of mortgages issued to a single borrower for contiguous housing units. Pet. App. 2a.

HUD conducted an investigation and concluded that petitioners' financing method violated HUD regulations. On June 19, 1989, HUD issued a Limited Denial of Participation (LDP) that prohibited petitioners from taking part in certain HUD housing programs in South Carolina for one year. On August 23, 1989, HUD proposed that petitioners be debarred from participating in most Executive Branch programs for five years.[1] Upon learning that petitioner had used the same financing method to obtain permanent financing for other housing developments, HUD proposed that petitioners be debarred indefinitely. Pet. App. 2a.

Petitioners challenged the LDP and the debarment before an Administrative Law Judge. On April 13, 1990, after a four-day hearing, the ALJ issued an initial decision and order that upheld the LDP but reduced the indefinite debarment to a period of 18

[1] A person who is debarred may not act as a participant or principal in any "primary covered transactions" and "lower tiered covered transactions" with the Executive Branch of the federal government for the period of the debarment. 24 C.F.R. 24.200(a) and (b).

months. Neither petitioners nor the Assistant Secretary of Housing sought agency review of this decision.[2]

2. Petitioners brought this action in district court seeking a declaration that the LDP and debarment violated the Administrative Procedure Act, 5 U.S.C. 551-559, 701-706, and the Due Process Clause of the Fifth Amendment.[3] The government moved to dismiss the action on the ground that petitioners had failed to exhaust their administrative remedies. The district court denied the motion. The court concluded that the applicable regulation does not explicitly require exhaustion. In addition, the court ruled that requiring petitioners to exhaust administrative remedies would have been futile, that available administrative remedies were insufficient, and that requiring exhaustion would have shielded the ALJ's decision from judicial scrutiny. On the merits, the district court reversed the ALJ's decision imposing an 18-month debarment. Pet. App. 8a-19a, 20a-32a.

[2] HUD regulations provide that

> [t]he hearing officer's determination shall be final unless, pursuant to 24 CFR Part 26, the Secretary or the Secretary's designee, within 30 days of receipt of a request decides as a matter of discretion to review the finding of the hearing officer. The 30 day period for deciding whether to review a determination may be extended upon written notice of such extension by the Secretary or his designee. Any party may request such a review in writing within 15 days of receipt of the hearing officer's determination.

24 C.F.R. 24.314(c). See also 24 C.F.R. 26.25(a) (setting out requirements for a petition for review).

[3] One month after this suit was filed, HUD issued a final determination restating the terms of petitioners' debarment as specified in the ALJ's order. Pet. App. 91a-92a. See 24 C.F.R. 24.314(g).

3. The court of appeals reversed. Pet. App. 1a-7a. The court relied on the "long settled rule of judicial administration that no one is entitled to judicial relief for a supposed or threatened injury until the prescribed administrative remedy has been exhausted." *Id.* at 4a (quoting *Myers* v. *Bethlehem Shipbuilding Corp.*, 303 U.S. 41, 50-51 (1938)). The court recognized that "[t]he rule of exhaustion is * * *, 'like most judicial doctrines, subject to numerous exceptions.'" Pet. App. 4a (quoting *McKart* v. *United States*, 395 U.S. 185, 193 (1969)). For example, exhaustion is not required if administrative review would be futile, administrative remedies are inadequate, or requiring exhaustion would leave the administrative decision unreviewed. Pet. App. 5a (citing cases).

The court concluded that petitioners had not shown that any of these exceptions to the exhaustion requirement applied in this case. Although petitioners asserted that further administrative review would have been futile because "the upper echelons of HUD had endorsed debarment," the court found no indication in the record that HUD had "taken a hard and fast position that [made] an adverse ruling a certainty." Pet. App. 5a (quoting *Thetford Properties IV Ltd. Partnership* v. *HUD*, 907 F.2d 445, 450 (4th Cir. 1990)). In addition, the court rejected petitioners' argument that administrative remedies were inadequate because the Secretary is permitted to extend the time within which to issue an administrative decision. The court concluded that the time limitations imposed by regulation were adequate in the absence of a showing that the Secretary has failed, or will fail, to act within a reasonable period of time." Pet. App. 6a. Finally, the court rejected petitioners' argument that requiring exhaustion would preclude judicial review. Petitioners, "by strategic decision or otherwise," allowed the 15-day period for requesting agency review of the ALJ's decision to expire. *Ibid.* Consequently, petitioners cannot complain that the exhaustion requirement makes the ALJ's decision unreviewable. Pet. App. 7a.

ARGUMENT

The Court "long has acknowledged the general rule that parties exhaust prescribed administrative remedies before seeking relief from the federal courts." *McCarthy* v. *Madigan*, 112 S. Ct. 1081, 1086 (1992) (citing *Myers* v. *Bethlehem Shipbuilding Corp.*, 303 U.S. 41, 50-51 (1938)). Exhaustion "serves the twin purposes of protecting administrative agency authority and promoting judicial efficiency." *McCarthy*, 112 S. Ct. at 1086. The exhaustion requirement is particularly appropriate "when the action under review involves exercise of the agency's discretionary power or when the agency proceedings in question allow the agency to apply its special expertise." *Ibid.* (citing *McKart* v. *United States*, 395 U.S. 185, 194 (1969); *Bowen* v. *City of New York*, 476 U.S. 467, 484 (1986)). Allowing the agency an opportunity to correct its own errors reduces the volume of cases in the judicial system and results in a more complete administrative record. *McCarthy*, 112 S. Ct. at 1086-1087.

Congressional intent is "[o]f 'paramount importance' to any exhaustion inquiry." *McCarthy*, 112 S. Ct. at 1086 (quoting *Patsy* v. *Board of Regents*, 457 U.S. 496, 501 (1982)). If Congress "specifically mandates, exhaustion is required." *McCarthy*, 112 S. Ct. at 1086. See *Coit Independence Joint Venture* v. *FSLIC*, 489 U.S. 561, 579 (1989). "But where Congress has not clearly required exhaustion, sound judicial discretion governs." *McCarthy*, 112 S. Ct. at 1086; see *McGee* v. *United States*, 402 U.S. 479, 483 n.6

(1971). "In determining whether exhaustion is required, federal courts must balance the interest of the individual in retaining prompt access to a federal judicial forum against countervailing institutional interests favoring exhaustion." *McCarthy*, 112 S. Ct. at 1087. That "intensely practical" inquiry requires attention "to both the nature of the claim presented and the characteristics of the particular administrative procedure provided." *Ibid.* (quoting *Bowen* v. *City of New York*, 476 U.S. 467, 484 (1986)).

Contrary to petitioners' assertion (Pet. 8), the court of appeals did not "create[] a novel and insupportable 'rule of judicial administration' that any possible administrative appeal must be exhausted." Instead, the court of appeals merely applied settled legal principles and concluded, as a matter of "sound judicial discretion," that petitioners were required to exhaust their administrative remedies.

Petitioners do not challenge the court of appeals' determination that the institutional interests advanced by requiring exhaustion in this case outweigh petitioners' interest in obtaining immediate access to the federal courts. Instead, they advance the radical argument that courts have no discretion to determine whether exhaustion of administrative remedies is required, because Section 10(c) of the Administrative Procedure Act, 5 U.S.C. 704, allegedly provides that exhaustion is never required unless a statute or regulation specifically provides otherwise. Petitioners' contention is unpersuasive.

Section 704 provides:

> Agency action made reviewable by statute and final agency action for which there is no other adequate remedy in a court are subject to judicial review. A preliminary, procedural, or intermediate agency action or ruling not directly reviewable is subject to review on the review of the final agency action. Except as otherwise expressly required by statute, agency action otherwise final is final for the purposes of this section whether or not there has been presented or determined an application for a declaratory order, for any form of reconsiderations, or, unless the agency otherwise requires by rule and provides that the action meanwhile is inoperative, for an appeal to superior agency authority.

By its terms, Section 704 provides only that a "final agency action" is "subject to judicial review." The statute does not provide that such actions are always subject to immediate judicial review, without regard to established doctrines such as exhaustion of administrative remedies that "govern the timing of federal court decisionmaking." *McCarthy*, 112 S. Ct. at 1086. Accordingly, the courts of appeals that have considered the issue have recognized that Section 704 governs the jurisdictional issue of finality, not whether exhaustion should be required as a matter of sound judicial administration. See *Missouri* v. *Bowen*, 813 F.2d 864, 870-871 (8th Cir. 1987); *Montgomery* v. *Rumsfeld*, 572 F.2d 250, 253 n.3 (9th Cir. 1978); *Steere Tank Lines, Inc.* v. *ICC*, 675 F.2d 763, 766-767 (5th Cir. 1982). Indeed, if exhaustion of administrative remedies were a jurisdictional prerequisite, the courts could not exercise jurisdiction in cases in which exhaustion would be futile or administrative remedies are inadequate.[4]

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[4] Petitioners' reliance on the legislative history of Section 704 is also unconvincing. The Attorney General's analysis of Section 704 stated that the provision was "intended to state existing law." S. Doc. No. 248, 79th Cong., 2d Sess. 369 (1946). Prior to the enactment of the APA, it was established that an

There is no force to petitioners' contention that the court of appeals' decision conflicts with this Court's decision in *ICC* v. *Brotherhood of Locomotive Engineers*, 482 U.S. 270 (1987). In that case, the Court held that a timely petition for administrative reconsideration "render[s] the orders under reconsideration nonfinal," and therefore extends the 60-day period within which a party may petition for judicial review of an administrative order under the Hobbs Act, 28 U.S.C. 2341 *et seq.* 482 U.S. at 284-285. In the course of its discussion, the Court stated that 5 U.S.C. 704 "relieve[s] parties from the *requirement* of petitioning for rehearing before seeking judicial review (unless, of course, specifically required to do so by statute)." 482 U.S. at 284-285. The Court's statement that a petition for rehearing is not necessary to render an administrative order "final" within the meaning of Section 704 does not imply that courts have no discretion to require exhaustion of administrative remedies as a prerequisite to judicial review. Indeed, if petitioners' expansive reading of Section 701 were correct, the Court's lengthy exhaustion analysis in leading cases such as *McKart* v. *United States*, 395 U.S. 185 (1969), and *McGee* v. *United States*, 402 U.S. 479 (1971), was superfluous.

Petitioners are also off the mark in contending that the decision in this case conflicts with decisions of other courts of appeals. The decisions cited by petitioner are consistent with the framework of analysis established by this Court's decisions and applied by the court of appeals in this case. In each case, the court examined the relevant statutes to determine

administrative appeal was a prerequisite to judicial review. See *Chicago, M., St. P. & P. R.R.* v. *Risty*, 276 U.S. 567 (1928); *United States* v. *Sing Tuck*, 194 U.S. 161 (1904).

Congress's intent, and applied the judicial doctrine of exhaustion where no such intent could be discerned. See *Steere Tank Lines, Inc.* v. *ICC*, 675 F.2d 763, 766 (5th Cir. 1982) ("administrative scheme devised by Congress, and used by the ICC * * * clearly requires" exhaustion); *Gulf Oil Corp.* v. *Department of Energy*, 663 F.2d 296, 307-309 (D.C. Cir. 1981) (statute does not explicitly require exhaustion, and "time-honored purposes of exhaustion" not applicable); *New England Coalition* v. *Nuclear Regulatory Comm'n*, 582 F.2d 87, 99 (1st Cir. 1978) (relevant regulations provided, and agency conceded, that exhaustion was not required). Accordingly, no further review is warranted.[5]

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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[5] Contrary to petitioners' contention (Pet. 4), HUD regulations provide that the ALJ's decision is inoperative pending review by the Secretary. The ALJ's decision is "final unless a party timely appeals the decision and * * * the Secretary decides to review the determination." 24 C.F.R. 26.24(f). "During such period, the hearing officer's determination is not final and, therefore, has no immediate effect." 48 Fed. Reg. 43,304 (1983).